

R. O. M. 2 4
OBSERVATIONS

ON THE

O P I N I O N

OF

Mr. G. R O U S,

LATELY DELIVERED BY HIM IN

The H—E of C—NS,

“ THAT THE CROWN CAN GIVE INDEPEN-
“ DENCE TO AMERICA, WITHOUT THE
“ ASSENT OF PARLIAMENT.”

TOGETHER WITH

Mr. R O U S's Argument.

L O N D O N:

Printed for G. KEARSLEY, at No. 46, in Fleet Street.

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MR. C. R. O. U. S.

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MR. R. O. U. S. Argument.

LONDON:

Printed by G. Kearsley at No. 45, in Fleet Street.

1793.

TO THE PUBLIC.

MR. G. Rous having delivered an opinion in the *H—e* of *C—ns*, that *the Crown could give independence to America, without the assent of Parliament*, and a paper being afterwards published in the *Morning Chronicle* of *Monday* the 15th, and *Tuesday* the 16th instant, said to have been written by him, containing various arguments in support of the opinion, I read the paper with some attention, being then at leisure. To me the proposition appeared of such magnitude, of so much importance to all the subjects of the British Empire, that I thought an immediate answer was requisite, and I was inclined to give one, as far as my poor abilities and time would permit.

I at first designed my observations for one of the public papers: with that

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view I hastily wrote them, but when I had concluded, I thought they were too long for, and of a nature too dry, to afford entertainment in a news paper. I consulted a friend, he was of the same opinion. Publishing them in the form of a pamphlet, in which I could give the whole of the paper whereon I had commented, appeared to me the fairest, and the best method. My friend approved the plan. I have, accordingly, given the paper at length, preceding my observations: if those observations contain any thing worthy the public attention, I shall be satisfied; should they not, I shall chearfully submit to the public opinion.

I have only to add, that I do not mean any *serious* attack on Mr. Rous. I have too high an opinion of his abilities, and too much esteem for him, to make such an attempt.

Wednesday,
May 17, 1780.



OMEGA.

THE inclosed paper was written by Mr. G. Rous, in vindication of an opinion which, as he says, he was led to declare in a late debate in the H—e of C——ns. The paper will bear its own recommendation to the public. It abounds with the soundest arguments, drawn from the established principles of the constitutional law of this country in particular, and those of the law of nations in general, put in the strongest light, and compressed within the narrowest compass that I recollect ever to have met with upon any subject; and I must, 'till I see better, think them incontrovertible.

A Lawyer.

“THE power of the crown to establish peace, by yielding independence to revolted colonies, has been strenuously denied, and the necessity of delegating a special authority for that express purpose by an act of the whole Legislature, has been asserted with much warmth and vehemence. Yet the question, in the view which these gentlemen take of the subject, is rather speculative than important; because *their wish* to confer this power admits that the crown *ought* to possess it, while the *indefinite terms* in which they propose to convey this authority, are an indirect acknowledgment,

ledgment, either, that the power from its nature is incapable of *previous limitations*, or, that the *interests* of the state do not require that *these limitations* should be *imposed*. In the judgment of these gentlemen, the crown *ought* to possess this power *indefinite, unrestrained in its exertion*, the ministers and advisers being responsible to Parliament for the exercise of this, as of every other trust. The single dispute between us is, whether this power resides in the supreme executive Magistrate, as a part of the original trust inherent in his office, or, whether an act of parliament be necessary to correct this supposed defect in the British constitution.

“ The event which gives occasion to the present question, viz. the revolt of colonies, is perfectly new: we cannot therefore obtain the aid of experience. We must reason from analogy, and from the distribution made of political power among the several orders of the state. One error I wish to preclude—No argument can be drawn from communications made by messages from the Throne, or from the approbation given to any measure by *the votes or addresses* of either House of parliament. The votes and addresses of either, or both Houses, convey *no authority*; because by a fundamental principle of our government, the concurrence of the *three branches* is necessary to *every act* of the Legislature, each possessing an absolute negative on the other two, as the means of restraining the excesses of all. Addresses may convey *advice*; but advice presupposes

supposes power in the person to whom the advice is given, having for its object the *proper direction of that power*.

“ Reasoning from analogy, I would ask any man, what power similar to the present ever was exercised by Parliament? Parliament, from the numbers of which it is composed, from the different orders of which it consists, from the forms of its proceedings, from the irregular times of its meetings, from its want of secrecy, vigour, unanimity, and dispatch, seems to me little qualified for the exercise of this power, or of any other part of the executive government. The delegation proposed by General Conway's bill proceeds upon this disability, admits that the authority *ought* to be vested in the crown: yet he threatens with impeachment the minister who dares to believe that this authority does not reside in Parliament for *the mere purpose of abdication*, or that it does belong to the executive Magistrate, by whom alone he confesses this authority can be properly exerted. Unable to discover a possible good effect of such an abdication of authority, I am apt to suspect the principle from which it originates, and am inclined to think, that an authority actually exists in the crown, which General Conway thinks ought to be given. Powers analogous, indeed so similar that one is tempted to think them the same, have ever been exercised by the crown; the powers I mean are, those of declaring war, of directing the national force, of receiving, sending, and *instructing*

instructing Ambassadors; of negotiating, and finally concluding the terms of peace. In the exercise of the last, territories have been relinquished, nay, even in time of profound peace, Dunkirk was sold to France by Charles II. This scandalous breach of trust afterwards became an article of impeachment against the minister, but no man ever denied that the power was properly vested in the executive Magistrate. In a negotiation with France, no man can doubt that a treaty yielding any part of America to the subjection of France, would be within the authority of the crown; to arrange the limits of territory between the respective states, is the ordinary subject of every treaty of peace. Yet, who ever heard of an act of the British Parliament either antecedently to *delegate this power* to the crown, or to *confirm* the cession when made? If no such act exists, the executive Magistrate must possess the power, as a part of his original trust. Now suppose France does not demand the cession of a province to *her dominion*, as the condition of peace, but merely an *abandonment of this province* by Great Britain, with permission to the inhabitants to govern themselves. Cannot the executive Magistrate, who can unquestionably make the *greater* cession, make the *less*? or, must the ridiculous ceremony be observed of yielding the territory to the dominion of France, that France by a separate treaty may again yield it to the inhabitants? Perhaps an adversary may be inclined to admit, that in a treaty with an acknowledged sovereign

sovereign, all this reasoning might be just, but that the real difficulty is that of treating with revolted subjects. This difficulty is derived from pride and passion, not from reason. In the first place I would ask this adversary, in what act of Parliament, he finds the catalogue of these sovereigns with whom the crown may treat? When the Dutch united provinces became sovereign states? or whether the engagements taken with the people, before Spain acknowledged their independence, were valid? I would next remind my adversary that his notable distinction can possibly lead only to one of these two conclusions—either that in an *indirect negotiation* the interests of Great Britain must be committed to the *Ministers of another state*, or that if the political situation of Great Britain requires, that America should be detached from the general confederacy, by *yielding her independence in a direct negotiation*, it will be the duty of the crown to communicate this intention to parliament, and probably defeat the attempt by disclosing it. Writers on the laws of nations agree, that revolted subjects, while able to maintain their revolt, must be treated as hostile states and the established rules of warfare be observed towards them, because the *relations* are the *same*, and out of the *same relations* the *same duties* must arise. Yielding to invincible necessity, we have acted towards the Americans as a hostile state; have exchanged prisoners; made conventions; and, unable to subdue

subdue them, must, I fear, close the scene in the same manner—by a final treaty of peace. The reasons which vest in the crown the power of negotiating other treaties, apply with equal force to this; nor can my understanding discover the important distinction: the additional trust is not *extremely dangerous*, since the crown can *unquestionably withdraw the troops*, and instantly give them independence, by an act which no power can recall. The direction of the national force, and the cession of a contested territory, seem to be powers so intimately blended, that whatever laws may have declared, perhaps these were never really and in effect separated in the history of any nation. In this government, should the crown withdraw the garrisons of Gibraltar, now besieged, or of Port Mahon, which the enemy are preparing to besiege, vengeance on the minister would be the only possible atonement to the country.

“ I will not refer to our history or the antient writings of lawyers for the extent of prerogative, because our Kings heretofore exercised undefined authority in every part of government, large remains of which are yet to be seen in the foreign dependencies of Britain. I will reason wholly from the principles of Government established at the Revolution of 1688.

“ The authority of parliament properly so called, *i. e.* of the *three estates acting conjointly* is wholly *legislative*, and extends to all persons and things in their nature the subject of legislation.

lation. In this character, Parliament *prescribe* *rules of conduct* both to King and People, whenever they judge it expedient. But laws in their nature are rules of conduct prescribed *antecedent to the act* which is intended to be regulated; and where these either cannot be, or, in fact, are not given, the controul is of a different kind. It is effected by the two houses acting separately and distinctly—the one accusing, the other punishing the ministers and advisers of the Crown for an *abuse of the trust* vested in the Crown. To confound these distinct capacities of Parliament is to destroy the controul.

“ All rights of the subject and of the prince in *internal government*, are capable of being accurately defined, and are therefore the proper subjects of legislation—But wherever laws are given, *i. e. rules antecedently prescribed*—the power of rendering them effectual, is not exercised by the Ministers of the Crown. Judges nominated indeed by the Crown, but independent when named, expound the law; and a Jury, chosen by lot from the people, apply the law so explained to the particular case; or where the law and fact are complicated, or the intention of the party involved in the decision (as in criminal cases) the Jury may, and generally ought to *determine the whole*, having first heard the law explained by the Judge, and received the facts from the testimony of witnesses: for the Jury are a tribunal little liable to corruption, whose corruption cannot extend beyond the particular

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cause, and who have a common interest in protecting their fellow-subjects from oppression. Should these rights of the subject, thus ascertained, be subverted by fraud, or overborne by violence, Parliament doubtless ought to interpose, not in the character of legislators, but to impeach and punish the authors of the injury, or even, in cases of *extreme necessity*, to adopt the example of our ancestors in the glorious Revolution.

“ Beyond these rights thus defined, nations possess *rights* relative to *other states*, who *acknowledge no law* but that which the Creator hath given, and even in the *interpretation of this law* admit no judges but themselves. The appeal here, therefore, is to force; and the decision is by arms. The power of prosecuting these rights, through the various stages of the contest, from the first appearance of injury to the final pacification, form the external executive power of the State. I will not say this power cannot in some degree be exercised by popular assemblies; the examples of the antient republics prove the thing to be possible, yet I would refer to the histories of those commonwealths, the Roman in particular, to prove the superior wisdom of our own constitution, which has vested this authority in the Crown. In whomsoever this authority is vested, it seems from its nature incapable of *definite limits*—The execution must depend on an infinite variety of circumstances, and be guided by events

as they arise. Who can foresee the probable successes or defeats in war, the force to be prepared by the several states, the use to be made of that force, or the designs entertained by the different Princes of Europe? If these cannot be foreseen, how is it possible to *prescribe rules* for a conduct dependent on circumstances *not known at the time*? The attempt would be ridiculous, and, in fact, has never been made. Neither will it be more desirable that Parliament should *ratify the act when done*. To ratify the act when done could answer no purpose but that of protecting Ministers. Let Parliament once pass a law confirming a particular act of the executive power, there is an end of impeachment by the Commons, and of the judicial power of the Lords. Let discoveries be afterwards made, let the guilt of the Minister be as plain as the sun, *this law* will be *his defence*. The *consent of the Crown* must be obtained to the *repeal of the law*, (a decisive proof that it ought never to have passed) before his conduct can even be questioned. For this reason, where a direct controul is intended over the executive power of the Crown, this cannot be effected by the two Houses acting in their *legislative capacity* in conjunction with the Crown, but in *their separate distinct* characters as *accusers* and *judges*. With great propriety and truth, therefore, Sir William Blackstone says, “ In the exertion of those
 “ prerogatives, which the law has given him,
 “ the King is *irresistible and absolute*, according

“ to the forms of the constitution. And yet if
 “ the consequence of that exertion be manifestly
 “ to the grievance or dishonour of the kingdom,
 “ the Parliament will call his advisers to a just
 “ and severe account. For prerogative consist-
 “ ing (as Mr. Locke has well defined it) in the
 “ *discretionary power of acting for the public good,*
 “ where the positive laws are silent, if that
 “ *discretionary* power be abused to the *public*
 “ *detriment*, such prerogative is exerted in an
 “ unconstitutional manner. Thus the King
 “ may make a treaty with a foreign state, which
 “ shall irrevocably bind the nation, and yet
 “ when such treaties have been judged pern-
 “ cious, impeachments have pursued the Mi-
 “ nisters, by whose agency or advice they were
 “ concluded.” Let him who will not yield to
 the authority last mentioned, examine the beau-
 tiful and masterly description of the English
 constitution by the president Montesquieu, where
 he explains the reason why the legislative power
ought to have no right to *stop* the executive, and
 why to blend these powers would be the de-
 struction of our constitution. In the present
 instance, to unite these powers would be to
 exempt the persons entrusted with the execu-
 tion from all possible controul.

“ Having established the general reasoning,
 let us apply it to the particular case. A law is
 proposed giving authority to the crown to con-
 clude finally with America, meaning on the
 terms of yielding their independence. If it be
 a mere

a mere delegation of a general power, leaving to the *discretion* of ministers to determine *when* or whether it is *ever to be employed*, such a law certainly admits that the crown *ought* to have this general unrestrained power—If it be intended as an intimation, that the time may probably soon arrive, when the exercise of this power will be *proper*, such a law may not only forward the event, but certainly lessens the responsibility of ministers. If, lastly, it be intended to prescribe the *immediate exercise* of this power, such a law will be a plain assumption of the executive authority by the legislature, an union of powers which ought ever to be distinct, and will exempt ministers from all future examination of their conduct, by giving the previous sanction of parliament to *their act*; for it were idle to suppose the parliament could exercise a correct judgment on the subject. To form an opinion on the propriety of yielding independence to America, requires an accurate knowledge of the state of that country, of the temper of the people, of the resources of their government, of our own force, its destination and probable success—lastly, it requires a perfect knowledge of the force and resources of our enemies, of the views and engagements of the other states of Europe. Whence could this knowledge be derived, but *from the executive magistrate*, who has all the means of information in his hands. With his ministers, all ambassadors, and all other persons in a public employ,

employ, correspond. To him is confided the secret service money, with every other means of procuring intelligence. *His ministers* would, therefore, in effect *dictate* the judgement of parliament, yet would an act *thus procured* operate as an act of *indemnity* to ministers. Let us not be wiser than our ancestors. Let us permit the executive power to proceed within its proper department, where the *abuse of trust* is not *palpable and clear*; and when time shall disclose all the circumstances under which ministers shall have acted, at present known only to themselves, let us judge their conduct with temper, and acquit or condemn, as their merits or demerits, may require. The law proposed, in the first view, presumes a defect in the constitution, which I cannot admit; and in the latter view will operate as an indemnity to ministers, pernicious in its immediate effect, much more so in its example.

“The question has been proposed. Do you contend that the crown can give independence to Ireland, or yield Scotland to a foreign state? Were I disposed to employ the same fallacy, I would ask, Can parliament repeal the Habeas Corpus Act, abolish the trial by jury, or give the force of laws to the proclamations of the crown? *All government is a trust*. Plain and palpable *abuses*, require *extraordinary* interposition. Should *parliament* forget its duty, the *people*, should the *crown* betray its trust, *parliament* must interpose—not, I hope, to confound the

the different orders of the state, but to place the *trust* in more *honest* hands. In the present instance, either a *cession* of territory as the means of peace is *necessary*, or it is *not*. In doubtful cases it is scarcely possible that parliament should antecedently possess the information, without which they cannot decide. The delays of their proceeding, and the public discussion of the information necessary, if such could be obtained, would destroy all the advantages which this country possesses, by placing the executive power in the crown. If the cession be *obviously unnecessary*, the *breach of trust* is *apparent*—parliament will interpose by addressing the crown to remove the ministers, to break the convention, which, derived from fraud, *would not bind the nation*; would punish the ministers, or in cases of urgent necessity, where obstinate perseverance involved the ruin of the country, perhaps remove the sovereign and his family from the throne. Writers on the laws of nations have displayed great acuteness in discussing cases in which the nation at large, or the inhabitants of a ceded territory may resist the sovereign. Their principles apply equally, whether *the people* themselves or *their representatives* commence the resistance. I am not however reasoning on extraordinary cases; I reason, to use Sir William Blackstone's expression, "according to the forms of the constitution."—Neither is the distinction worth much contention. *Prevention* would in
most

most cases be impossible. The commander of a garrison may yield a fortress, and may deserve death for his conduct; yet to regain the fortress would be difficult. Should the crown at this time withdraw the garrisons of fort St. Philip and Gibraltar, the *breach of trust* would be *gross*, yet most men, in the present situation of affairs, would despair of regaining the possession. Should the crown recall the fleets and armies of Great Britain from America, is there a man wild enough to recommence the war from the hope of conquest? The truth is, that where the decision is referred to arms, he who has the direction of the national force, always must have it in *his power* to betray the rights of the community. Fortunately, where the breach of trust is most easy, the temptation is least. All the affections of the sovereign, the love of glory, of power, and of dominion, all the passions which govern men occupied in conducting the affairs of nations, war against the cession of a country which the force of the state can possibly retain. The probability is greater that Britain will be exhausted in a vain and fruitless struggle for dominion which she cannot uphold, than that the contest should cease before the *interests* of Great Britain demand a *cessation of hostilities*; or that the *inclination* of the sovereign to a disgraceful peace should *precede* the *necessities* of the state. The power of declaring war is a more *dangerous trust*, more liable to *abuse*. Yet this trust is absolute in the sovereign. When the resolution

resolution is taken, the ambassador recalled, and war in effect commenced, messages are indeed sent to both houses of parliament, and general assurances of support returned in their addresses. Why? because the power of the purse, the grant of men, money, and ships, depend on the pleasure of parliament. This power operates in some degree as an *antecedent restraint*, but is not wholly effectual as a preventive. The war is effect commenced, and defensive warfare at least becomes necessary to the public safety. Every man who has read our history knows, that even this power of parliament was principally insisted upon with a view to a very different object, as a restraint in the *internal government of the country*. Could the sovereign raise money without the consent of parliament, parliaments were unnecessary: could the sovereign levy troops without consent of parliament, he might by force overturn the laws. These grants of men and money are therefore made only for a year; nay, the military laws by which the troops are governed continue for no longer space, that without the concurrence of parliament by a new grant, by a renewal of those laws, the whole force entrusted to the sovereign may be actually dissolved. This restraint, though principally directed to the internal government, operates likewise as a considerable, but a *very inadequate controul* to the power of declaring war against foreign states.

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“ Many gentlemen have been misled by the acts of parliament necessary in the conduct of this war. While the war is carried on against revolted subjects, not acknowledged as independent states by the *proper authority* (wherever that authority is vested), every American taken in war had a right by the laws of this country to be tried as a rebel, or to be released; every man had a right to reclaim his property, who had not forfeited that property by conviction. The interposition of the legislature therefore became necessary, but this necessity was derived from the *forms of our internal government*. From the same cause proceeded the act of parliament authorising commissioners to treat with America. The object of this mission was to settle the terms on which the Americans should submit to be subjects to Great Britain. Their claims were various *exemptions from the legislative power of parliament*. Parliament necessarily therefore became a *contracting party*, because the crown could not impose *limitations on the power of parliament*. This case was likewise new. Limitations imposed on the supreme legislature by *stipulations with subjects* have no precedents in our history. The thing itself became necessary, and the forms of our government decided by whom the act must be done. But it may be said, *acts of parliament* have been made respecting America. Can the crown repeal them? *Acts of parliament* have also been made respecting Grenada, St. Vincent's, &c. yet let these islands be
ceded

ceded in a treaty with France *made by the crown*, these acts must fall, because the subject of legislation will no longer exist. The reasoning applies equally to America, when a cession of America shall be made by the proper authority. I think from the analogy of our government, that authority resides in the crown. The sovereign cannot by any stipulations vary the rule of *internal government*, because he is a monarch limited by *laws*, or by *rules of conduct* prescribed by the *legislature*. The external executive power (where the internal government is not affected) seems to me incapable of such *previous laws*; in fact, none are given. This therefore, in the language of Mr. Locke, is "a discretionary power of acting for the public good where the positive laws are silent;" for the abuse of which, if not directed to the public good, Ministers are responsible. The acts of this power are in their nature momentary, for the most part incapable of recall, always dependent on circumstances known at the time only to those entrusted with the other parts of executive government. To transfer this power to Parliament, to make the treaty their act, can answer no good purpose, will operate as an indemnity to Ministers, and remove the single constitutional controul of which the subject is capable—the punishment of those who abuse it.

"When this question occurred in the House of Commons, the principles on which I have

here reasoned being familiar to my mind, I was inadvertently led hastily to declare an opinion. —A gentleman then speaking heard the expression, and compelled me by his vehement attack publicly to avow a sentiment that *between us at least* was purely *speculative*, for his bill was intended to give this power to the crown. He desired to correct a supposed defect in the constitution, I thought this defect did not exist. I am not vain enough to suppose my reasoning will change the opinions of others, but I wish to have it understood what the opinion thus hastily drawn forth really was. If I err in the principles here stated, I have Sir William Blackstone, Locke, and Montesquieu, I will not say, the companions, but rather the authors of my error. If in the application of these principles I have erred, it is an error which my understanding is at present unable to detect."

TO
 of Commons, the principles on which I have
 here

discussed with the greatest temper, and the

The few instances I may notice, and the observations I shall offer, may suggest to some after head, hints for sound arguments, to over-

turn the reasoning contained in the Essay in question, and convince mankind it hath at-

tempted to establish a new system of

of great consequence, dangerous to the

rights of Englishmen, and to the British con-

stitution. We may readily admit our form of government to be the most perfect yet known, but perfection belongs not to human

IT is only the natural moderation of my

temper, prevents me from being very angry

with the *officious friend*, who has obtruded on

the Public a PAPER pretending it to be your

composition. Previous to this publication, my

opinion of your understanding, had you known

it, would not have given you pain. I will not

say it is yet altered—but I doubt and waver.

How cautious should a man be, not to trust out

of his own hands, the production of his pen,

until he has well considered the subject, the

arrangement of the matter, and the style of his

composition?

I am conscious of *my* inability to write stric-
tures on that PAPER, or to enter the lists with
you. I am conscious I ought to use the caution
I would recommend to others; but the subject
is, in my opinion, of great importance. 'Tis
very proper for disquisition—and it ought to be
discussed

discussed with the greatest temper, and the utmost freedom.

The few strictures I may make, and the observations I shall offer, may suggest to some abler head, hints for sound arguments, to overturn the reasoning contained in the *Paper* in question, and convince mankind it hath attempted to establish an erroneous proposition, of very great consequence, dangerous to the rights of Englishmen, and to the British constitution. We may readily admit our form of government to be the most perfect of any yet known, but perfection belongs not to humanity, and whatever is imperfect, will admit of improvement.

However, to the object of my present labor. That your *efficient friend* deserves reprehension will be clear, when it is seen that he has given the *Paper* to the world, before it had been properly corrected by your masterly pen. It begins thus: "The power of the Crown to establish peace, by yielding independence to revolted colonies, has been strenuously denied, and the necessity of delegating a special authority for that express purpose, by an act of the whole legislature, has been asserted with much warmth and temper." Being old, my memory may fail me, but I think my preceptor in logic, many years since, called such a proposition as this a *petitio principii*. The next sentence deserves attention, viz. "Yet the question in the view which these gentlemen
" take

"take of the subject, is rather *speculative* than
 "important; because THEIR wish to confer this
 "power admits that the crown ought to possess
 "it, while the *indefinite terms* in which they
 "propose to convey this authority, are an in-
 "direct acknowledgment, either that the
 "power from its nature is incapable of pre-
 "vious limitations, or that the *interests* of the
 "state do not require that *these limitations* should
 "be imposed." Here the *grammarian*, the *poli-
 tician*, and the *logician* are at a stand: The *first*
 looks for the *antecedent* to the relative *these*; the
politician wonders much how any man of letters,
 particularly a lawyer, can alledge that the *subject*
 is rather *speculative* than *important*; and the
last cannot comprehend how it can be a fair
 deduction, that an intended *donee* OUGHT to
 receive, what a generous benefactor is inclined to
 give; how an *agent* OUGHT to receive a power
 a *principal* is about to delegate; how the use of
indefinite terms in conveying an authority, can be
 an indirect acknowledgment, that the power
 granted is, from its nature, incapable of pre-
 vious limitations; when all human powers,
 political, mechanical, &c. are finite, and ca-
 pable of diminution and limitation; or how the
 use of such terms can, by any means, prove
 that the *interests* of the state do not require that
 the limitations should be imposed; because he
 conceives it can, at most, but shew the *opinion*
 of those using the terms, who may, as well as
 others,

others, be mistaken with respect to the *interests* of the state.

After the above strictures, I must do justice to the author of *the paper* by saying, he has fairly stated the question when he says, "The
" single dispute between us is, whether this
" power resides in the supreme executive ma-
" gistrate, as a part of the original trust inhe-
" rent in his office; or whether an act of
" parliament be necessary, to correct this sup-
" posed defect in the British constitution?"
Indeed the latter part, or rather second question, is unnecessary, after stating the first, because, if a power does not reside in the executive magistrate, an act of parliament is indisputably requisite, should we admit the necessity of his possessing such a power.

The paper says, "We must reason from
" analogy, and from the distribution made of
" political power among the several orders of
" the state." I consider this as two propositions, and think the first wrong, the second right. If the case is *entirely new*, and nothing similar hath happened in the history of our constitution, we may fairly reject all reasoning by analogy; but the distribution of political power, is well worthy our consideration: indeed, it is essentially necessary to consider it in every point of view, for a true determination of the question.

You say, "Reasoning from analogy, I would
" ask any man what power similar to the pre-
" sent

"sent ever was exercised by parliament?" The preceding paragraph may, in some measure, assist us with an answer. 'Tis thus: "The event which gives occasion to the present question, viz. the revolt of colonies, is PERFECTLY *new*: We cannot, therefore, obtain the aid of experience." By *perfectly new* I should suppose is meant, there is not any *such event* recorded in the annals of the British state. If there is not any thing *similar* in our history, I should think it a good reason why, on this occasion, we should avoid reasoning from analogy.

'Tis said "General Conway's bill admits that the authority *ought* to be vested in the crown;" (I can't say I find such an admission there) "yet he threatens with impeachment the minister who DARES TO BELIEVE that this authority does not reside in parliament, for *the mere purpose of abdication*, or, that it does belong to the executive magistrate, by whom, alone, he confesses this authority can be properly exerted."—If the General used such a threat, it must have been under a mistaken supposition, that the spirit of our *free* constitution would admit of an INQUISITION which could punish for *belief*. However, I do, with a noble Lord, most sincerely hope to God, IF ANY MINISTER IS MAD AND WICKED ENOUGH TO ADVISE HIS MAJESTY THAT HIS PREROGATIVE EXTENDS TO SUCH A DEGREE, THAT MINISTER WILL MEET THE JUST RESENT-

MENT AND INDIGNATION OF THE HOUSE OF COMMONS, AND BE PURSUED TO CONDIGN PUNISHMENT.

An acknowledgement that the authority contended for can be *properly exerted* by the executive magistrate alone, is not, I conceive, any argument, that he is at present invested with that power. Besides, the case being *perfectly new*, (as observed) how could the constitution have made any provision for it? or in the distribution of power, how could the executive magistrate, in this limited state, have been enabled to act in a case, which the constitution could not foresee; nor could, from its nature, presume? The people have not yet parted, and I trust never will part with ALL their power. They have retained a principal share of that SOVEREIGN AUTHORITY which is vested in the King, Lords, and COMMONS, in parliament assembled: That sovereign power, can and will make proper provision for *unforeseen* events; and a *right* to make such provisions, is one of its essential, and, as I contend, unalienable privileges.

But 'tis alledged that "powers analogous, indeed so *similar*, that one is tempted to think them the same, have ever been exercised by the crown;"—viz. "The powers of declaring war, of directing the national force, of receiving, sending, and instructing Ambassadors; of negotiating, and finally concluding the terms of peace;" and that "in the exercise

“ercise of the last, territories have been relinquished, nay even in time of profound peace, “Dunkirk was sold to France by Charles II.”

I am sorry my dullness of apprehension is such, that I cannot discover in any of the cases mentioned, (the last excepted) any *similarity* or *analogy*. And as to the excepted instance, I don't think it a fair or just conclusion, that, because a man *hath* done an act, therefore he had a *right* to do it. I must add, a King *may* break the sacred compact between him and his people, as well as his subjects be guilty of high treason.

The paper says, “No man ever denied that “the power (of selling Dunkirk) was properly “vested in the executive magistrate.” I don't know that the fact was so. Had I been then living, I would have denied it, and *denied it loudly*. However, make the most of it, 'tis only a case, according to your state of it, Sir, that passed *sub silentio*. And such a case, if contrary to the principles of the constitution, would weigh but little, even in Westminster Hall. I must submit, that with equal propriety, my Steward having *some* interest in my estate, (a Steward who is such by my election, and not by inherent right) might sell the estate, dissipate the money in debaucheries, and leave me to exquisite distress, and total ruin.

But to the next position in the *paper*, which is curious. “In a negotiation with France, “no man can *doubt* that a treaty, yielding ANY “PART of America to the subjection of France.

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“ would

“ would be within the authority of the crown.” I hope, *doubting*, in such a case, is not punishable by the criminal law of England. Whether it is, or not, I can’t help doubting of the truth of a proposition so *general*, and so *very extensive* in its *consequences*. ERGO, the writer is mistaken when he says, *no man can doubt*.—Though perhaps I am wrong; as I might go farther and say, I have *no doubt*. I must confess my present opinion does not coincide with that of the author.

But he proceeds, and says, “ To arrange the limits of territory between the respective states, is the ordinary subject of every treaty of peace.” And from hence would draw an argument to support his opinion. Yet, where is the analogy? Where is the similarity? The very nature of our constitution implies, that such a power is delegated, and properly delegated, to the executive magistrate. ’Tis inherent in his office; ’tis a case foreseen, and provided for by the constitution. But even here I conceive he does not act in a *sovereign* capacity, but with a *delegated* power; as the REPRESENTATIVE, if I may so express it, of the EMPIRE. Yet, what analogy is there between this, and *abandoning sovereignty*, residing in the *whole* of an empire, over a great part of its *dominions*. A *sovereignty*, which I conceive with great deference and submission, is not vested in the executive magistrate, but resident and inherent in the SOVEREIGN POWER of the state,

state, of which the executive magistrate, as King, possesseth only a part.

Farther on, the paper says, "Perhaps an adversary may be inclined to admit, that in a treaty with an acknowledged sovereign, all this reasoning might be just, but that the real difficulty is that of treating with *revolted subjects*. This difficulty is derived from *pride* and *passion*, not from *reason*." *Petitio principii* again! A mode of arguing I should suppose the author fond of, did I not know the soundness of his judgment. But his *officious friend* should not have sent the *paper* forth, without revision and correction.

To take the assertion as it stands, 'tis a round one, and easily made. But *I* am not influenced by *pride* or *passion*: I do coolly think the difficulty a great one; and such a one, as I trust, should occasion require, nothing but an ACT OF PARLIAMENT will surmount.

With what sovereigns the crown may treat, will not be found in *acts of parliament*, but in the SPIRIT of the CONSTITUTION it may be found.

It is said the adversary's—"Notable distinction can *possibly* lead only to one of these two conclusions—either that in an *indirect negotiation* the interests of Great Britain must be committed to the *ministers of another state*, or that if the political situation of Great Britain requires that America should be detached from the general confederacy, by *yield-*
ing

“*giving her independence by a direct negotiation, it*
 “ will be the duty of the crown to communi-
 “*cate this intention to parliament, and probably*
 “ defeat the attempt by disclosing it.” To say,
 the attempt, if ever made, ought to be defeated
 would not be argument. But the author forgets
 that such a power might be delegated, if oc-
 casion required, in a *few days*, to be carried
 into execution, either at any future period of
 time, however distant, or almost instantaneously,
 before it could be defeated by the enemy.

’Tis said “ The crown can *unquestionably*
 “ *withdraw the troops*, and instantly give them
 “ independence, by an act which no power
 “ can recall.”— I will remind the learned
 gentleman, that many millions have been voted
 and given by the people, here ; and many brave
 men have sacrificed their lives, in the service of
 their country, to compel a return of the Ameri-
 cans to their obedience to the parent state ; and
 should the crown, contrary to the intent of the
 people, as declared by their representatives in
 parliament (the legal constitutional mode, where-
 by the crown knows the intent of ALL the
 PEOPLE.) I say, should the crown, thus circum-
 stanced, withdraw the troops, and thereby give
 independence to America, I will leave the learned
 gentleman and his *officious friend*, to give SUCH
 AN ACT, its *proper name*.— My hopes, as to
 the advisers of such a measure, are already ex-
 pressed—and I have before said, THE CROWN
 MAY BREAK ITS COMPACT WITH THE PEO-

PLE—with that people whose blood and treasure have been expended to acquire, establish and support the Colonies; for the benefit of THE PEOPLE chiefly, not merely for the interest, or the pleasure of the crown, or as an object of traffic, barter, exchange, conveyance or disposition, at its sole whim and caprice. Let me add, because *I may* do an act, it does not from thence follow, that I *ought* so to do—I conceive this to be a self-evident proposition. The King has not any property in America, but in right of his crown—all lands and tenements which he has, belong to him in right of his crown, and are called, *Sacra Patrimonia* or *Dominica Coronæ*. With respect to England, the English law saith, that all the lands in the kingdom are holden *mediate vel immediate* of the King, tho' the King holds of no one. Here, I have only to ask, could he dispose of my lands by virtue of his prerogative, under pretence that it would be for the public good, without the assistance of an act of parliament, and without making me an adequate satisfaction?

To proceed—The writer of the paper says, “The *direction* of the national force, and the *cession* of a contested territory, seem to be powers so intimately blended, that whatever laws may have declared, perhaps those were never really, and in effect separated, in the history of any nation.” Not to criticise on the manner in which the passage is worded, does it contain any argument? The question is not what

what he who has the direction of the national force *can* do, but what by the spirit of the constitution he has a right to do?

I admire the author for giving up instances of *undefined authority*, exercised by our Kings before the revolution.—I think he does right, because I believe few of those he alludes to, were authorised by the forms, the principles, or the spirit of the constitution.—He says, he “ will “ reason wholly from the principles of go- “ vernment, established at the revolution of “ 1688.”

There's great difference between *examples* and *principles*; and I must beg permission, Sir, to remind you, there are many more principles of government, besides those established at the revolution; whereon the constitution of this country is founded.

'Tis said “ the authority of parliament, “ properly so called, *i. e.* of the *three estates* “ *acting conjointly*, is *wholly legislative*.” But does not experience shew us it is frequently employed in delegating *new* powers, not only to the supreme executive magistrate, but to inferior magistrates also? With respect to the *latter*, unless care is taken, it may be too often so employed, to the great oppression of the subject, and the subversion of the constitution.

As to what is said of “ the crown's prosecuting the rights of the nation, relative to “ *other states*,” I don't see how it applies in the present case; for that is not this case, nor, according

according to my opinion, in any respect similar. We have not yet acknowledged the independency of *America*; if we had, the present question could not now subsist: The Americans are, therefore, in the situation of, and in fact are, *revolted subjects*, waging a *civil war*, and notwithstanding what the writer of the paper hath advanced on that subject, I conceive the LAW of NATIONS has not any thing to do with the case; unless I am greatly mistaken it hath not laid down nor can it prescribe a law to regulate the conduct of any state, during a civil war, or after its cessation, with respect to its revolted subjects. If the state conquers, and reduces the insurgents to obedience, it will punish some, and grant a general amnesty to the rest, without consulting what is called the law of nations, or regarding what hath been done by other states, in cases of revolt; for circumstances, infinite in number, distinguish one case from another; and the history of mankind does not, perhaps, furnish one, in every respect, similar to the present. The wisdom of those concerned in the administration of government, will direct them to do, what is proper and advantageous for the state. And though in cases of rebellion, the crown may perhaps have a right to pardon every one concerned, it does not from thence follow, that it hath a right to relinquish, what in fact it does not possess, viz. *sovereignty* over the revolting subjects, because, as before observed, the *sovereign power* of the British state,

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resides

resides in the King, Lords and Commons, in parliament assembled; for there resides the power of MAKING LAWS, and where that power is, *there must be*, or rather, *that is*, the SOVEREIGN POWER: from thence only, can the crown derive a right to give *independence* to the people, of any part of the British dominions, and such a power is of so much importance to the state, and the people have so great an interest at stake, that the delegation ought to be expressed in the clearest, fullest and most explicit manner: if, therefore, such a grant hath ever been made, if such a delegation exists, let the writer produce it, and there will be an end of the argument:—but, no such express grant or delegation is pretended, it is to be *presumed*: and reasoning from analogy, from other powers, pretended to be similar, vested in the supreme executive magistrate, on the original distribution of the powers of the state, is to substantiate that presumption, and justify the conclusion. However, in the first place, I conceive it to be of too much importance, to admit it's existence from presumption only, or even without the most irrefragable proof: in the next place I do *totis viribus* deny, that there is any similar power, vested in the crown; and the reasons I give, will, I hope, afford conviction to every impartial mind: besides, I don't conceive such a power (for it must be *general*, and extend to *all* possible cases of the kind, without limitation, for if limited it must have been limited, not by the crown

crown *possessing*, but by some person or persons *delegating* it) I say, I do not conceive such a power *can* exist in this country, and the form of our constitution, viz. *a limited monarchy, a mixed form of Government*, be preserved. If the crown, by its prerogative, can give *independence* to the subjects of the STATE, it must, I think, be *absolute*—the constitution be an absolute monarchy—the supreme executive magistrate be the *sovereign*; for no power on earth but sovereign, can abandon sovereignty, can give independence to subjects, can free and release them from obedience and allegiance.

In another point of view, permit me to ask if the subjects could, in such case, be guilty of treason against the STATE, or only of treason against the PERSON of the KING?

In a few words it appears to me, that the proposition involves many absurdities, supposing our constitution, or form of government, is such as I have always understood it to be.

I must admit, that the reasoning contained in the *paper* is in many instances good, the principles true; but the mistake is in the *application* of the one and the other, to the present question, to which I think they bear little or no relation.

To proceed, the writer of the *paper* says,
 “ Let parliament once pass a law *confirming*
 “ a particular act of the executive power, there
 “ is an end of impeachment by the commons,
 “ and of the judicial power of the lords.” This

position I admit, because true—but first, the law may be repealed ; and, secondly, how does it apply to the present case? Delegate, by act of parliament, (that is, by an act of the *whole state*) a power to the crown to give (if occasion requires) independence to America. Does not the delegation imply the trust shall be executed *bona fide*? And may it not be abused? If the power should be improperly exercised ; if independence should be given when America might be reduced to obedience, &c. would not the ministers and the advisers of the measure be liable to impeachment? With a man who could answer the question in the negative I would not argue.

The author's quotation from *Blackstone* I conceive is not applicable ; and, if my memory does not fail me, there is not any thing to be found in Locke or Montesquieu to support the writer's position. The question here is, doth the crown possess the power, the subject of our debate? not whether the legislative power *ought to have* a right to *stop* the executive ; nor is the question concerning the blending or uniting of those powers. Suppose the crown has the power contended for, then, I say, it is such that *may*, or rather which *must* and will absorb all the other powers of the state. In fact, that the crown would, in that case, be absolute ; that the character of the person we have so long called and considered as the supreme executive magistrate hath been mistaken, and that, in fact, he is the SOVEREIGN of the state, possessed of

original, inherent or assumed, for one could scarce conceive it to be DELEGATED, power; and, according to the form of such a constitution, may do whatever he pleases, subject to no more legal or constitutional controul, than Julius Cæsar, or any other Emperor, was to the Roman people: Such would, in my opinion, be the person we call the supreme executive magistrate, if he possessed the *unlimited power* of giving independence to British subjects; for the writer has not pointed out any limitation of this power, and if the crown can give independence to America, it may to Ireland, Scotland, England, and the rest of the British dominions.

The author, speaking of the proposed law, says, “ If it be a mere delegation of a general power, leaving to the *discretion* of ministers to determine *when* or whether it is *ever to be employed*, such a law certainly admits that the crown *ought* to have this general unrestrained power”——Because we intend to *give*, or *delegate*, therefore the *donee* or agent OUGHT to *receive*, is an argument before considered.—It is said, and I admit, that the crown is the *most proper* to have the power, yet it does not from thence follow that it hath, or that it might not have been delegated to some *other*---reserving a right to ratify and confirm. Perhaps the Americans might be as well pleased to treat with and have the guaranty of the *whole state*, as of the crown alone.

’Tis

'Tis contended that the executive magistrate, only, possesses *sufficient knowledge* of the "subject." But that knowledge may, and I conceive ought to be communicated to the PEOPLE, whom I consider as the CONSTITUENTS of that magistrate, and that he was and is constituted for their good, not for his own. Subjects are not made for kings, but kings for their subjects.

The writer closes the paragraph now under consideration with this sentence: "The law proposed, in the first view, presumes a *defect* in the constitution, which I cannot admit; and in the latter view will operate as an indemnity to ministers, pernicious in its immediate effect, much more so in its example." I cannot comprehend how it can be considered as a *defect*, when I think I have shewn, it would have been repugnant to the forms, the principles, and the spirit of the constitution, and would have made this an *absolute* instead of a *limited* monarchy, or mixed form of government; nor do I see how it could operate as an indemnity to ministers, since every trust may be abused, and were they to do any thing contrary to the true design of those delegating the power, they would be liable to impeachment, as the law could not mean to give power to the crown to do, under every kind of circumstance, whatever it should please, and on such terms as it might think proper; but must mean that it should do what would, on the whole, be most
for

for the benefit of the state ; and that it should exercise the power, delegated, *bona fide*, on principles of sound reason and good policy : nor could the parliament, in my opinion, delegate a power so ABSOLUTE, UNCONTROULABLE and UNACCOUNTABLE, because in every delegation of a trust, the restrictions I contend for must be *implied*, if not expressed. And, if liable to abuse, it would be strange to say, that ministers, though in every other instance of abuse, of delegated power, *are*, yet that in this they *are not* subject to punishment.

Farther on the author writes thus : “ If the
“ cession be *obviously unnecessary*, the *breach of*
“ *trust is apparent*. Parliament will interpose
“ by addressing the crown to remove the mi-
“ nisters, TO BREAK THE CONVENTION,
“ which, derived from FRAUD, WOULD NOT
“ BIND THE NATION ; would punish the mi-
“ nisters, or, in case of urgent necessity, where
“ obstinate perseverance involved the ruin of
“ the country, perhaps remove the sovereign
“ and his family from the throne.” My dear
Sir, (if the *paper* is your’s) you speak out freely
here, like an Englishman, and were it not for
two or three subsequent particular passages, I
would instantly close my observations, and say,
you have given judgment for me.

It would be but justice to add, that you hav-
ing, in the house, hastily delivered an opinion
on a *new* and curious question, without time for
due consideration, have only been trying what
might

might be said in support of a position you knew was untenable. But to proceed: You here speak of BREACH OF TRUST; OF BREAKING THE CONVENTION: of its being derived from FRAUD; and, therefore, as NOT BINDING THE NATION. Now, in my opinion, if the power you contend for was vested in the crown, in the manner you suppose, the convention, obtained by any means, and on any terms whatever, though highly injurious to the state, WOULD BIND THE NATION. I need not add, about as much as the infamous sale of Dunkirk by Charles II. bound the nation. You'll be so obliging as to advert to what you have said on that point.

To proceed:—one of the passages alluded to is this—"where the decision is referred to arms, he who has the direction of the national force, always must have it in *his power to betray* the rights of the community."---But I conceive, this is not what is contended for by the writer. I apprehend he means that the crown is invested with a LEGAL power to give *independence*; or, all the observations I have been making are to no purpose: I have grossly mispent my time, and thrown away my labor.

"But it may be said," (observes the writer) "*Acts of parliament* have also been made respecting Grenada, St. Vincent's, &c. yet, let those islands be ceded in a treaty with France *made by the crown*, those acts must fall, because
" the

“ the subject of legislation will no longer exist,
 “ —The reasoning applies equally to America,
 “ when a cession of America shall be made by
 “ the proper authority. I think from the an-
 “ alogy of our government, that authority re-
 “ sides in the crown. The sovereign cannot
 “ by any stipulations vary the rules of *internal*
 “ *government*, because he is a monarch limited
 “ by *laws*, or by *rules of conduct*, prescribed by
 “ the *legislature*. The external executive power
 “ (where the internal government is not affec-
 “ ted) seems to me incapable of such *previous*
 “ *laws*; in fact, none are given. This there-
 “ fore in the language of Mr. Locke, is “ a
 “ *discretionary* power of acting for the public
 “ good, where the positive laws are silent,”
 “ for the abuse of which, if not directed to the
 “ public good, ministers are responsible.”—

Exclusive of what I have already said, as to the
 CONSEQUENCES that would result from the
 crown possessing the power in question, I
 would ask, if what is here said, as to the *external*
executive power of the crown, weighs a straw in
 the argument? We are debating, whether the
 power of giving independence, is, or is not, a
part of that power? Again, I would ask if the
 proper object of that external power, as hitherto
 understood, are not treaties of alliance, waging
 war and making peace with foreign independent
 sovereign states; regulating of trade, navigation
 and commerce, &c. &c. As to the discretion-
 ary power, mentioned by Mr. Locke, I take it,

he treats of the King's *known prerogative*, of which I contend the power in question is *not* a part—I am at present in the country where I have not access to proper books; what I have written, is entirely the result of my own reflections, &c.—but I may reasonably suppose books would be almost useless, when you, Sir, consider the case as *new*, reason wholly from *analogy*, and cite all you think necessary, to support your position.

The paper concerning which I have written so much, concludes thus——“ If I err in the
 “ *principles* here stated, I have Sir William
 “ Blackstone, Locke, and Montesquieu; I will
 “ not say the companions, but rather the *au-*
 “ *thors* of my error. If in the application of
 “ these principles I have erred, it is an error
 “ which my understanding is at present unable
 “ to detect.”—I, not having the pleasure of
 such good company as the two great men just
 named, but only of green trees, little shrubs,
 and cackling fowls, will not flatter myself that
 I have assisted such an understanding as your's,
 Sir; I will not say the *principles* you have laid
 down, are erroneous; nor can I admit, that if
 you are in an error, Blackstone, Locke and
 Montesquieu are the *authors* of that error.—
 I don't perceive that you have cited, nor do I
 recollect that they have laid down any princi-
 ples, which can support your argument: all I
 contend for is, the principles cited, don't apply.
 In truth the case is *new*, and I wish it may be
 the

the *last* as well as the *first*.—But I must draw to a conclusion, for I've written until I have fatigued myself much : perhaps you'll not wonder, when I inform you, I did not see the first part of your paper till Monday noon ; the latter part till Tuesday noon, and am finishing my observations on Wednesday morning—It is my first attempt of this kind, and I verily believe it will be the last.—In fact I am so heartily tired that I think no answer to my observations, nor any call whatever will induce me, even if I should have time (which is not very probable) ever to employ my pen a second time on the subject.

I am Sir really,
and *Bona Fide*,

Wednesday
May 17, 1780.

Your
Well-wisher,
OMEGA.

K. George III. King of Great Britain

(45)

the less as well as the less. — But I must draw to
a conclusion, for I've written until I have
fatigued myself much: perhaps you'll not won-
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any call whatever, will induce me, even if I
should have time, which is not very probable
ever to employ my pen a second time on the
subject.

I am Sir, really,
and Bona Fide,
Your

Wednesday
March 1780.

Well-wisher,
OMEGA.